LEGALEASE SOLUTIONS LLC

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

[redacted]

Plaintiffs/Counter-Defendants,

Case No. [redacted]

Hon. [redacted]

v

[redacted],

Defendants/Counter-Plaintiffs.

[redacted]

Attorneys for Plaintiffs/Counter-Defendants

Attorneys for Defendants/Counter-Plaintiffs.

[redacted]

MOTION SEEKING LEAVE TO AMEND THE COUNTERCLAIMS PURSUANT TO M.C.R. 2.118(A)(2)

Defendants/Counter-Plaintiffs request this Honorable court to grant leave to amend the counterclaims pursuant to MCR 2.118(A)(2) for including a claim for indemnification and for the reasons outlined in the attached brief in support.

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Dated_____

Submitted by,
[redacted],
Attorney for the Defendants/Counter-Plaintiffs.

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Attorneys for Plaintiffs/Counter-Defendants

Attorneys for Defendants/Counter-Plaintiffs.

[redacted]

BRIEF IN SUPPORT OF DEFENDANTS/COUNTER-PLAINTIFFS' MOTION SEEKING LEAVE TO AMEND THE COUNTERCLAIMS PURSUANT TO M.C.R. 2.118(A)(2)

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Introduction

Defendants/Counter-Plaintiffs have filed a counterclaim against the Plaintiffs/Counter-Defendants on claims for account stated, breach of promissory note, declaratory relief/ anticipatory repudiation, declaratory relief -breach of redemption agreement, fraud in the inducement/misrepresentation, breach of fiduciary duty/implied covenant of good faith and fair dealing, and Appointment of receiver under MCLA 600.2926.

For the reasons stated below, Defendants/Counter-Plaintiffs request this Honorable Court to grant leave to amend the counterclaims pursuant to MCR 2.118(A)(2) to include a claim for indemnification and to release Counter-Plaintiff [redacted] with respect to all notes that he has personally guaranteed and which are undelivered by the Plaintiffs/Counter-Defendants.

Statement of Facts

Until [redacted], Counter-Defendant [redacted] and Counter-Plaintiff [redacted] were each fifty percent (50%) owners of [redacted] On that date they closed a transaction pursuant to a Redemption Agreement (Exhibit), whereby [redacted] redeemed [redacted] Interest for (a) cash paid at Closing; (b) assignment of ownership of a subsidiary LLC, which owned certain real estate rights; and (c) delivery of a Promissory Note.

At the time of the Closing on the Redemption Agreement, [redacted] was required, according to the Redemption Agreement (Section 1.6) (Exhibit), to deliver releases of all personal guaranties previously given by [redacted] with respect to [redacted]

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[redacted] obligations. The obligations include various "investor notes" personally guaranteed by [redacted] These are funds loaned by private, wealthy individuals to [redacted] to use as operating capital. The investor notes are unsecured but were personally guaranteed by both owners of [redacted].

At the Closing, [redacted] delivered only some of the releases of the personal guarantees. For various business reasons, the [redacted] Redemption Agreement was closed despite the non-delivery of all releases of personal guaranty. The Redemption Agreement includes the provision that in the event the releases are not delivered, [redacted] will indemnify [redacted] for any claims asserted with respect to the Personal Guaranty, See Redemption Agreement, (Sections 1.6 and 6.3) (Exhibit ……..). However, [redacted] have not taken efforts so far to procure the undelivered releases or otherwise to indemnify [redacted] against claims asserted with respect to Personal Guaranty.

Law and Argument

When it comes to amending a pleading, Michigan courts generally take a liberal view. MCR 2.118(A) (2). According to MCR 2.118(A) (2), a pleading may be amended by the leave of the court and the courts are to grant the leave freely when justice so require. Seeking amendment is a right of a litigant than an act of grace by the court "in the absence of any apparent or declared reason such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice, futility of amendment, etc." *Ben P. Fyke & Sons, Inc. v. Gunter Co.,* 390 Mich. 649,659 (Mich. 1973); *Foman v Davis,* 371 U.S. 178,182(1962). Counter-Plaintiff [redacted] seeks to amend the counterclaims in order to include a claim for indemnification, and release [redacted] with

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respect to all the notes that he has personally guaranteed and which are undelivered. So far the Plaintiffs/Counter-Defendants have not taken efforts to procure the undelivered releases or otherwise to indemnify [redacted] against claims asserted with respect to Personal Guaranty. Hence, it has become imperative for the Counter-Plaintiff to amend the counterclaim. The Counter-Plaintiff [redacted] seeks to file the amended counterclaim in good faith. The amendment will not cause undue delay nor will it unduly prejudice the Plaintiffs/ Counter Defendants or amount to futility of amendments.

Courts have observed that, rather than "justice" as a prerequisite, the standard is whether injustice will prevail if amendment is denied "in the particular circumstance." *Ben P. Fyke & Sons, Inc.,* 390 Mich. 649,658 (Mich. 1973). If the instant motion to amend the counterclaim is denied, it will amount to an injustice to the Counter-Plaintiffs. The claim for indemnification is a pertinent claim to the Counter-Plaintiff Thurber's case.

In granting a motion to amend, the courts are not required to look into "the substantive merits" of the claim or defense, provided "it is legally insufficient on the face" so as to become futile. *Id.* at 661. Further it is observed that a Plaintiff should be allowed to test his claim on merit if the underlying facts or circumstance relied by the plaintiff is a proper subject of relief. *Foman,* 371 U.S. 178, 182 (1962). Counter-Plaintiff's claim is a valid one as the Counter-Plaintiff has sufficient evidence to prove his claim. The Redemption Agreement includes the provision that in the event the releases are not delivered, Plaintiffs/Counter-Defendants will indemnify Counter-Plaintiff for any claims asserted with respect to the Personal Guaranty. (Redemption Agreement, Sec. 1.6 and 6.3, Exhibit….). Plaintiffs/Counter-Defendants have failed to indemnify the

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Counter-Plaintiff as per the Redemption Agreement. Therefore, amending the counterclaims has become a prerequisite for the Counter-Plaintiff.

WHEREFORE, for the reasons discussed above, Defendants/Counter-Plaintiffs requests this Honorable Court to grant leave to amend the counterclaim.

Respectfully submitted,

DATED:

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